United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

Orig. w/affidavit of mailing

76-1405

To be argued by
EDWARD R. KORMAN

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1405

UNITED STATES OF AMERICA,
Appellant,

—against—

MICHAEL KAZUO YANAGITA and
MARC CHOYEI KONDO,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

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TABLE OF CONTENTS

TABLE OF CITATIONS

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Preliminary Statement

This is an appeal by the United States of America from an order of the District Court for the Eastern District of New York, Dooling, *J.* (A. 308) which dismissed informations filed by the United States Attorney charging each of the defendants with having unlawfully and wilfully disobeyed orders to answer questions put to them when they were subpoenaed to appear and testify at the trial of *United States* v. *Chin and Young*, 75 Cr. 851(S) (A. 5-6).

Statement of Facts

The information filed against the defendants Yanagita and Kondo arose out of their failure to respond to questions put them, after immunity had been conferred pur-

suant to 18 U.S.C. § 6001 et seq., at the trial of Kenneth Raymond Chin and Elizabeth Jane Young for various violations of the Federal Gun Control Law (A. 297-299). The indictment of Chin and Young followed a search and seizure on October 4, 1975, of a veritable arsenal of weapons in the apartment which they shared. The serial number of one of those weapons was traced to a firearms dealer in California who sold the weapon to the defendant Kondo.[1] Moreover, carbon copies of two documents filed by Chin with the New York City Firearms Control Board, which were also seized, indicated that two other seized weapons were purchased by Chin from the defendant Yanagita.[2] Accordingly, their testimony was sought with regard to the transfer of these weapons to Chin and Young.

A. The Trial of the Original Indictment

The indictment against Chin and Young was severed as to Chin and the trial against the defendant Young began in April, 1976. It ended in acquittal on one count and a mistrial on a second count. The defendant Yanagita was originally subpoenaed to appear as a witness at that trial and asserted his privilege against self-incrimination based on the possibility that his testimony could

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[1] The rifle bearing serial number S12590 was marked as Exhibit 5 at the trial of Chin and Young (Tr. 101) and the Firearms Transaction Record indicating that this weapon was purchased by the defendant Kondo from a licensed firearms dealer was admitted as Exhibit 7 (Tr. 120). The transcript of the trial and the exhibits are part of the record on appeal in *United States* v. *Chin* and *Young*, Docket No. 76-1304, which is scheduled to be argued the week of February 28, 1976.

[2] The two carbon copies were marked as Exhibits 24 and 25 for identification at the trial of Chin and Young (Tr. 185). The originals which were prepared when the weapons were purchased were admitted as Exhibits 14 and 15 (Tr. 373-374).

be used against him in a prosecution in Japan.[3] He did not make a request, pursuant to Section 3504, that the United States affirm or deny the existence of illegal electronic surveillance, nor did he claim that he had a right to refuse to answer any questions because they were the fruit of any alleged illegal electronic surveillance.

Ultimately a stipulation was entered into to admit an out-of-court statement in lieu of Yanagita's testimony. Since his testimony would be necessary in the trial of Chin which was scheduled to follow the trial of Young, Yanagita was directed to appear on April 20, 1976, to testify in that trial.

B. The Notice To The Defendants Regarding The Second Trial

On April 19, 1976, after the mistrial and partial acquittal of Young, a superseding indictment was returned against both Chin and Young. On April 20, 1976, when he appeared as previously directed, Yanagita was directed to appear to testify on June 21, 1976, at the trial of the superseding indictment (A. 142).[4] Moreover, Kondo,

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[3] A supplemental affidavit filed in support of the search warrant for the Chin and Young residence suggested the possibility that the two might have been involved in a plot to assassinate the Emperor of Japan who was then visiting the United States. Since two rifles were found in the Chin and Young apartment which Yanagita sold to them, he claimed that he might be named a defendant in a prosecution in Japan for conspiring to kill the Emperor. This claim was rejected by the trial judge (A. 152) and by Judge Dooling, to whom the contempt informations were assigned (A. 311-312).

[4] The statement in the transcript which appears at A. 142 that Yanagita was "directed" to appear on June 21, 1976, is not quite accurate. The fact is that he was served with a subpoena to appear on June 21, 1976.

who could not be served with a subpoena in time to testify at the first trial, was served with a subpoena on May 18, 1976 to testify on June 21, 1976, and a copy of that subpoena was sent to his attorney, James Reif, on May 10, 1976 (A. 141-142). Accordingly, he too had over thirty days notice of his appearance at the up coming trial.

Although it was conceded that both Yanagita and Kondo had more than ample notice of their required appearance to testify at the trial of the superseding indictment, no claim was ever made that their testimony was "inadmissible" because it was "the primary product of an unlawful act or because it was obtained by exploitation of an unlawful act" (18 U.S.C. § 3504). Moreover, the United States was not asked to affirm or deny the existence of any "unlawful act" as defined in Section 3504. Instead, on the return day of the subpoena, in the midst of the trial of the superseding indictment, Yanagita and Kondo filed motions asking the United States to affirm or deny the existence of electronic surveillance at their places of residence and for an adversary hearing to determine the legality of such surveillance and to determine whether such surveillance led to their being called as witnesses (A. 91, 96-97).

C. The Application of the Defendant Yanagita

In support of his application, the defendant Yanagita alleged that he had encountered numerous difficulties in the use of his telephone, including the inability to obtain dial tones, clicks on his wire, other voices on his line and a "terrific amount of static" (A. 99). Although he did not say whether or not he had ever reported these difficulties to the telephone company, he believed that his "home telephone has been the subject of electronic surveillance" and "that no judicial approval for such surveillance has

been obtained and any such surveillance is unlawful" (A. 99). Moreover, the defendant Yanagita alleged that he talked to Elizabeth Young "on occasion" on his home phone and that "[a]t least one of those conversations, which occurred between July 29 and October 4, 1975, was relevant to the subject matter of the indictment in this case" (A. 100).

The affidavit omitted any explanation as to his failure to raise this issue at any time prior to the return day of the subpoena, despite the fact that it was apparent that Yanagita was aware of all the facts upon which it was predicated long before that day.

D. The Application of the Defendant Kondo

The application of the defendant Kondo was similar to that of Yanagita. He alleged in his affidavit that since the summer of 1975, he had encountered "several unusual circumstances in trying to use his home phone", including difficulty in putting through telephone calls, absence of a dial tone or long delays in obtaining a dial tone, other voices on the phone and the fact that his phone had "gone 'dead'" in mid-conversation (A. 93). Although surprised, one day in August or September, 1975, to find someone who identified himself as a telephone repairman at his home (A. 93), he too professed a belief that he had been the victim of unauthorized illegal electronic surveillance (A. 94). Moreover, he alleged that, when in November, 1975, he was questioned by one John Carenco, an agent of the Bureau of Alcohol, Tobacco & Firearms, he was shown a file which contained personal information about him which was the subject of a telephone conversation between himself and Elizabeth Young.

He also claimed to have had other telephone conversations with Elizabeth Young between July 29, 1975 to October 4, 1975, "and otherwise", involving matters relevant to the indictment which were alleged to have taken place (A. 94).

Needless to say, this affidavit contained no explanation for the failure to raise the issue of electronic surveillance prior to the return day of the subpoena, although he had known all of these facts for some time and had at least over thirty days notice of his appearance.

E. The Explanation For The Untimely Application

The explanation for the delay came in an unsworn colloquy between James Reif, the attorney for Yanagita and Kondo, and Chief Judge Mishler (A. 143-144):

> "Mr. Reif: I don't make this motion lightly and it is quite possible to make a motion of this sort rather quickly, rather easily, based on information and belief, and so forth.
>
> I didn't do that because I wasn't aware that there was a sufficient basis to believe that Mr. Yanagita or Mr. Kondo might have been the subject of electronic surveillance.
>
> I make this motion only upon learning the facts contained in Mr. Kondo's affidavit.
>
> I had not seen or met Mr. Kondo until Friday. We made an arrangement whereby he could come a few days early so I could speak to him and only after speaking to him did I realize there was such a possibility and therefore, I inquired of Mr. Yanagita as well and it is on the basis of facts that I learned over the weekend that the motion is made.

> *I could have made a motion six weeks ago and that would have put the matter before your Honor sooner—"* (Emphasis supplied).

Mr. Reif then indicated that he obtained the information as to Mr. Yanagita from information he obtained from Mr. Kondo "in discussion." The "discussion" took place on the Friday preceding their appearance on Monday, June 21, 1976.

Chief Judge Mishler then asked whether Mr. Reif had immediately notified the Assistant United States Attorney of his intent to raise the issue. Mr. Reif responded that "[t]his is the first day of court since I learned of the matter" (A. 143). Chief Judge Mishler then stated (A. 143):

> "Mr. Reif, I find the motion is made in bad faith. I find that the lawyer participated in it. I find that it was done solely for the purpose of avoiding the coercive power that the Court has in a contempt proceeding because under your tactics —and that's all it is—if the Court were to accede to the consideration of the motion and direct the Government to check the agencies, the Court would be without power to hold this defendant, this witness in contempt.
>
> You indicated the last time that you had a theory of extraterritorial criminal jurisdiction that might be exercised by the Japanese Government and you argued that. At least that was a logical, arguable theory. But that fell through so now you come into court and demand revelation of any electronic surveillance knowing that if the Court directed the Government to do it, Mr. Yanagita * * * wouldn't have to worry about possible jail for refusing to testify.

It's offered as a palpable fraud upon the Court and I can describe it as nothing else.

Now, swear Mr. Yanagita in——"

F. The Contempt of Court Proceeding Before Chief Judge Mishler

After Mr. Yanagita refused to testify, having been granted immunity, Chief Judge Mishler asked how long it would take to make an all-agency check to deny the existence of illegal surveillance "to eliminate the last vestige of a claim for not testifying" (A. 156). He was advised that, although it normally took a number of weeks, it was possible to get an oral representation within days, but that it could only be done orally and not within the guidelines set down by the Department of Justice for an all-agency check (A. 157).

Such an oral representation was not satisfactory to Mr. Reif (A. 183). Instead he requested sworn statements from every agency involved in the investigation, including the Federal Bureau of Investigation, the Secret Service and the Bureau of Alcohol, Tobacco and Firearms (A. 182). Mr. Reif observed that the reason this had to be done in writing and "very carefully and exhaustively" was because quick oral checks often "turned out to be incorrect" (A. 183). Accordingly, he demanded sworn unequivocal statements.

After further colloquy, during which it was conceded that Yanagita had been subpoenaed in April to appear on June 21, 1976, and that Kondo had been served on May 18, 1976 (A. 187), Judge Mishler adhered to his holding that "the motion comes too late" (A. 188). Chief Judge Mishler further found that an affidavit (A. 104)

which had been filed by an Assistant United States Attorney during the day, which related an oral representation by a Special Agent of the Bureau of Alcohol, Tobacco and Firearms, that they had no record of any electronic surveillance of the telephones of Yanagita and Kondo, was sufficient to satisfy Section 3504 (A. 188):

> "I find that the motion comes too late. More than that, in balancing the factors and the equities, the affidavit of Mr. Pattison indicating that the Bureau of Alcohol, Tobacco & Firearms made an investigation and found no electronic surveillance on Mr. Yanagita's telephone and Mr. Kondo's telephone, suffices.
>
> I direct the attention of the Court of Appeals, if this record goes to the Court of Appeals, to this practice that I think should be condemned in no uncertain terms."

The defendant Yanagita was again called to the stand and again refused to testify (A. 189-193). He was adjudged to be in contempt of the district court and was directed to surrender the following morning. The same refusal to respond to questions, after immunity had been conferred, prompted a similar adjudication against Mr. Kondo (A. 195-204). On the following morning, after being given yet another opportunity to purge himself, the defendant Yanagita again refused to answer and he was ordered committed to the Metropolitan Correction Center for the duration of the trial, but not to exceed one month (A. 206). Later that day Mr. Kondo received similar treatment (A. 218).

On June 23, 1976 after Judge Mansfield denied an application for a stay pending appeal, both defendants were incarcerated until June 25, 1976, a total of two days, when a verdict was returned.

G. The Verdict

The jury found the defendants not guilty on all but two of the six counts of the indictment which involved the testimony of Yanagita and Kondo. After the jury returned its verdict, Chief Judge Mishler told them (Tr. 848-849):

> "I think that you looked at the evidence very carefully and from what I see of your verdict you just felt that the Government didn't prove its case as to some of the counts and rightfully, you found the defendants not guilty.
>
> I can now tell you more than I could before concerning the witnesses Yanagita and Kondo.
>
> Yanagita and Kondo were both subpoenaed by the Government. They refused to testify and that accounted for some of the recesses we took.
>
> * * * *
>
> Now, you just heard the evidence that was sifted through and that the Government was allowed to introduce. That's the way it should be. You decided the case on what was before you.
>
> It may have been that if Yanagita and Kondo came into Court to testify that you may have found enough evidence in the other charges.
>
> Mr. Levin-Epstein [the Assistant United States Attorney] argued vigorously that I should tell you that either party could have called the witnesses but I felt that might tip you off and you might feel that they refused to testify because of the defendants and I felt that might be prejudicial if you knew they refused to testify, against the defendants. You see, it might have occurred to you they might have had valuable tesimony to give you

against the defendants. Well, that wasn't fair because that wasn't in the record. That is not the way cases are tried."

H. The Criminal Contempt Information

Because the remedy of civil contempt is virtually useless in a trial of so short a duration as that of Chin and Young, informations were filed on June 24, 1976, charging the defendants Yanagita and Kondo with violation of 18 U.S.C. § 401 by wilfully and knowingly disobeying a lawful order of the district court to testify (A. 5-6). The cases were assigned to Judge Dooling for trial.

Prior to trial, the defendants moved to dismiss the indictments on the grounds, *inter alia*, that they had a right to refuse to testify because the United States had failed adequately to respond to their motions for disclosure of electronic surveillance (A. 266). The affidavit filed by Mr. Pattison was alleged to be inadequate (A. 274-275):

> " * * * Pattison stated only that the *ATF* had no record of surveillance on movants' respective home phone numbers. * * * Pattison also stated orally that the ATF Agent in charge of the case had no knowledge of electronic surveillance. There was no denial of electronic surveillance of Kondo or Yanagita individually; there was no denial of electronic surveillance of their respective home premises (only that their phones were not tapped); most significantly, *there was no inquiry with either the Secret Service or the FBI, despite the fact both were admittedly actively involved in the investigation of the underlying case.* Defendants respectfully submit this response was insufficient as a matter of law."

Moreover, the defendant Kondo argued that the information against him should be dismissed upon the further ground that the approval of the application for an immunity order by an Acting Assistant Attorney General was improper and that, therefore, the order to him to testify was invalid (A. 289).

Judge Dooling granted the motion to dismiss (A. 308-312). He observed that, "whatever the unfortunate effect of the tactics resorted to by counsel for the defendants, there was not a sufficient evidentiary base to support a conclusion that the motion was unduly delayed and could not be regarded as timely" (A. 312). Without further explanation for this conclusion, Judge Dooling also disagreed with Chief Judge Mishler's finding that, under the circumstances, the affidavit submitted by Mr. Pattison was sufficient (A. 312).

> So far as concerns the conclusion that the defendants' showing did not impose on the Government the duty, under 18 U.S.C. 3504, to make a broader agency check, the record leaves it unclear whether that conclusion was a finding based on the motion papers or was in part derived from the partial agency check that Mr. Pattison was able to make and to relate in his affidavit. The affidavits submitted for the defendants were certainly not demonstrative that their telephones were wiretapped: they sufficed in reporting a coincidence of telephone malfunction and reporting the possession by a Government agent of information that could have been derived from telephonic eavesdropping. Cf. In re Millow, 2d Cir. 1976, 529 F.2d 770, 774. The affidavits did not have to go farther; the person whose telephone has been covertly tapped is inevitably hard put to demonstrate that that occurred which was designed to be indiscoverable. The

> affidavits were not really met by any intimation of what other source had led the Government to the defendants and to their link with Chin and Young. There remains, then, the unexplained failure to make any check with FBI and Secret Service agents in a case that may well have grown out of the alleged assassination plot in which those agencies participated.

Judge Dooling observed that it was "not now possible, as in many Grand Jury cases, to have an evidentiary hearing to determine whether or not there were any wiretaps and whether, if there were, they were what led to the defendants' questioning." This was so because (A. 313):

> "* * * In many of the Grand Jury cases the witness can still be called and the testimony compelled if there has been no illicit eavesdropping. The original direction to testify is invalidated, but, after a hearing, a new direction can be given. That is not true in the case of the witness at a criminal jury trial whose refusal to testify might determine the outcome of the case. But United States v. Huss, 2d Cir. 1973, 482 F.2d 38, 44, accepted the Government's concession that the trial witness, like the Grand Jury witness, is protected by 18 U.S.C. 2515, 3504. As Gelbard v. United States, 1972, 408 U.S. 41, 92 S.Ct. 2357, 33 L.Ed. 2d 179, put the power of a Grand Jury witness to decline to testify squarely on the statutory policy behind and the language of 18 U.S.C. 2515 and not on any constitutional ground, cf. United States v. Calandra, 1974, 414 U.S. 338, 347-349, 354-355 and fn. 11, 94 S.Ct. 613, 38 L.Ed.2d 561, the ground of the concession is plain enough, and the damage to orderly trial proceedings appears to be irremediable. Cf. United States v. Huss, supra,

> 482 F.. at 45 and fn. 6. That Gelbard as extended to the trial witness requires further scrutiny in the appellate courts (cf. Stone v. Powell, 1976, — U.S. —, 96 S.Ct. 3037, 49 L.Ed.2d —), or perhaps better, by the Congress, is clear."

Judge Dooling also agreed with the claim of the defendant Kondo that the order to him to speak was invalid because the underlying application for an order conferring immunity was not approved by the Assistant Attorney General, but his deputy acting in his absence pursuant to the regulations of the Department of Justice (A. 313-314).

ARGUMENT

POINT I

The District Court erred in dismissing the indictment on the ground that the denial of illegal electronic surveillance was inadequate.

A. Introduction

In *Gelbard* v. *United States*, 408 U.S. 41, the Supreme Court held that upon "a showing that interrogation would be based upon the illegal interception of the witnesses' communications" a grand jury witness would have just cause to refuse to answer (408 U.S. 45). Moreover, the plurality opinion of Mr. Justice Brennan stated that such a witness would have the right pursuant to 18 U.S.C. § 3504 to demand that the United States affirm or deny the existence of illegal electronic surveillance where the witness claims that his testimony is inadmissible because it was the product of illegal surveillance (408 U.S. 54-55). The significance of Mr. Justice Brennan's opinion is that its reasoning did not command the votes of the majority of the Supreme Court.

Mr. Justice White, who cast the deciding vote, stated that while he agreed with the majority under the facts in the case, where illegal wiretapping was "assumed" to exist (408 U.S. 46-47), he stated that other circumstances may arise "for striking a different accommodation between the due functioning of the grand jury system and the federal wiretap statute" (408 U.S. 70). So, for example, where electronic surveillance had taken place pursuant to a warrant, he indicated clearly that a grand jury witness could not refuse to answer on the ground that the warrant was invalid (408 U.S. 70):

> "Suppression hearings in these circumstances would result in protracted interruption of grand jury proceedings. At the same time, prosecutors and other officers who have been granted and relied on a court order for the interception would be subject to no liability under the statute, whether the order is valid or not; and, in any event, the deterrent value of excluding the evidence will be marginal at best. It is well, therefore, that the Court has left this issue open for consideration by the District Court on remand."

This necessity to take account of the policy considerations regarding the functioning of the grand jury has been recognized repeatedly in subsequent cases. See, e.g., *In re Persico*, 491 F.2d 1156 (C.A. 2, 1974); *In re Grusse*, 402 F. Supp. 1232 (D. Conn. 1975), affirmed 515 F.2d 157 (C.A. 2, 1976). As Judge Newman explained in his opinion in *In re Grusse, supra*, which was adopted in the order of affirmance, "[t]he willingness to accept some risk of illegal wiretapping in the context of a contempt proceeding involving a grand jury witness seems to be grounded on the fact that requiring a witness to respond after obtaining use immunity is a less drastic assertion of a governmental power than prosecuting a person for a criminal offense" (402 F. Supp. at 1236).

Moreover, it must be emphasized that a trial is significantly different from a grand jury proceeding in terms of the delay that can be tolerated. The reason is readily apparent, as the Chief Justice recently observed in *United States* v. *Wilson*, 421 U.S. 309, 318 (1975):

> "A Grand Jury ordinarily deals with many inquiries and cases at one time and it can rather easily suspend action on any one, and turn to another * * *. We noted in *Harris* that 'swiftness was not a prerequisite of justice. . . . Delay necessary for a hearing would not imperil the grand jury proceedings.' 382 U.S., at 164, 86 S.Ct., at 354. Trial courts, on the contrary, cannot be expected to dart from case to case on their calendars anytime a witness who has been granted immunity decides not to answer questions. In a trial, the court, the parties, witnesses, and jurors are assembled in the expectation that it will proceed as scheduled."

These policy considerations, to which the Chief Justice and Judge Newman alluded, provide the basis for our threshold argument that a trial witness, who has had ample notice of his appearance, and the facts upon which his claim of illegal surveillance is based, may not refuse to answer questions on the ground that the questions posed may be the product of illegal surveillance. Moreover, these considerations of policy likewise suggest, that even if some response is required, pursuant to Section 3504, the delay in raising the claim and other circumstances here, preclude the defendants from challenging the sufficiency of the denial. We submit that, at most, they should be entitled, prior to their trial for contempt, to demand that the United States affirm or deny the existence of illegal surveillance. This will ensure that the witness will not be convicted of refusing to answer questions based on illegal electronic surveillance.

B. The Defendant Did Not Timely Raise the Issue of Electronic Surveillance

We begin our discussion by observing that, if Chin and Young, who were the defendants in the trial at which Yanagita and Kondo were subpoenaed to testify had waited until after the start of the trial to allege that evidence sought to be used against them was the product of illegal surveillance, they would have been barred from so doing unless they had been denied an opportunity to make such a motion prior to trial or were not aware of the grounds upon which it was based. 18 U.S.C. § 2510 (a); F. R. Crim. P., Rule 12(b). These procedural rules, which are steeped deeply in policy, merely codify what has evolved into a sound rule of practice. As Chief Judge Kaufman observed in *United States v. Mauro*, 507 F.2d 802, 806-807 (C.A. 2, 1974):

> "* * * The requirement that objections be timely made served a number of important purposes. Foremost among these, of course, was the need to avoid interruptions of a trial in progress with auxiliary inquiries which not only broke the continuity of the jury's attention, but also interfered with that '[d]ispatch in the trial of criminal causes [which] is essential in bringing crime to book.' Nardone v. United States, 308 U.S. 338, 341-342, 60 S.Ct. 266, 268, 84 L.Ed. 307 (1939). Prompt objection to evidence which may have been illegally seized serves other objectives as well. A motion in advance of trial avoids the serious personal inconvenience to jurors and witnesses which would result from interruptions and delay once the jury had been selected and the trial had commenced. The more telling argument is that the waste of prosecutorial and judicial resources occasioned by preparation for a trial could be avoided

> if a timely and successful motion were made in advance. In addition, we cannot ignore the right of immediate appeal provided to the Government by the Omnibus Crime Control Act of 1968, as amended, 18 U.S.C.A. § 3731 (Supp. 1974) (appeal from pre-trial grant of motion to suppress); see also 18 U.S.C. § 2518(10)(b) (wiretape evidence). This right would be rendered meaningless if a request for suppression could be postponed until mid-trial, when the only alternative to abandonment of the prosecution would be completion of a fruitless and sometimes lengthy trial in the hope of an ultimately successful post-trial appeal from the granting of the suppression motion."

Accord: *United States* v. *Sisca*, 503 F.2d 1337 (C.A. 2, 1974).

All of these considerations are equally present where a witness, who has had timely notice of his appearance and is aware of the grounds for his motion, fails to timely assert his claim. Indeed, because the prejudice to such a witness, who is immunized from prosecution, is less than that of a defendant in a criminal case, a far more severe waiver policy is justified.

Here the affidavits filed by Yanagita and Kondo show on their face that they were aware of the facts upon which their claim was made long before trial and it is likewise undisputed that they each had more than ample notice of their appearance before trial. Indeed the defendant Yanagita had appeared at the first trial, and although he refused to testify, made no claim of illegal wiretapping. Moreover, no affidavit was filed explaining the reason for the delay and the only explanation that was given is patently inadequate.

The excuse ultimately offered as to untimeliness of the motion was that Kondo did not consult with his lawyer, Mr. Reif, about this matter until the Friday before his trial appearance and as a result of those "discussions" Mr. Reif apparently raised the issue with Mr. Yanagita. This is simply not a valid excuse. If Mr. Kondo was concerned that questions put to him might be based on illegal surveillance, he should have spoken with his attorney sooner. Here, it is significant that Mr. Reif was advised, on May 10, 1976, that a subpoena was to be served on Mr. Kondo. This type of casual attitude by the defendants, and the problems created when a claim of this kind is to be raised in the middle of a trial, should not be countenanced.

Moreover, we do not suggest that the defendants here may be punished criminally for contempt, if in fact they were subject to illegal surveillance and their testimony would have been the fruit of such surveillance. We are prepared now to respond fully to their demand to affirm or deny the existence of such surveillance. What is at issue here is whether the informations should be dismissed, under the circumstances here, even if there was no such surveillance. Our position is "a reasonable accommodation" between the necessity to maintain orderly trial procedures "and the federal wiretap statute" (*Gelbard* v. *United States*, *supra*, 408 U.S. at 70, Justice White, concurring).

C. The Denial That Was Made At The Trial Was Sufficient

We submit that, assuming witnesses should have the right to delay and disrupt a trial in the circumstances here by demanding an affirmance or denial of illegal electronic surveillance, the denial tendered was sufficient.

We concede that, if the request was timely made, the denial would not have been sufficient for some—although not all—of the reasons stated by the defendants.

Where, however, the demand is not made until the middle of trial, the witness is simply in no position to demand the kind of exhaustive all-agency check that normally takes at least four weeks to complete[5] or to any procedure which will delay the trial; at most he should be entitled to ask only whether the United States Attorney is aware of any illegal surveillance. Here there was a denial of any such knowledge (A. 104, 137-138). Moreover, a limited check was made to the Bureau of Alcohol, Tobacco and Firearms, the principal agency involved in the investigation of the case and contrary to Judge Dooling's suggestion, there was clear intimation of the "source [that] had led the Government to the defendants and to their link with Chin and Young" (A. 312). The search of the premises of Chin and Young, as we observed at page 2, *supra*, revealed New York City Firearms forms, in which Chin stated that he had purchased from Yanagita the two weapons that were the subject of Counts Five to Eight; and the serial number of another weapon, which was the subject of Counts Three and Four, was traced to the dealer who sold them to Kondo. Under these circumstances, Chief Judge Mishler was plainly correct in concluding that the denial made was sufficient.

Judge Dooling suggested that checks similar to that made of the Bureau of Alcohol, Tobacco and Firearms should have been made of the Secret Service and the Federal Bureau of Investigation because they at one time

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[5] See 23 United States Attorneys Bulletin 1007 (1975).

involved in the investigation of Chin and Young. We do not believe that even the delay of the trial to check with the Bureau of Alcohol, Tobacco and Firearms was necessary here, and the additional delay of checking other agencies was certainly not required. But this consideration aside, we do not believe that defendants who have displayed the casual attitude toward their obligations evidenced here, should be permitted after the fact to say that actions which were undertaken in haste, in the midst of a trial of another matter, were inadequate. Had they acted responsibly, their request would have been fully honored. Since they did not do so, they should, at most, be entitled to the dismissal of the informations *only* if the questions put to them were based on illegal electronic surveillance.[6]

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[6] Judge Dooling's discussion of this issue concluded with the somewhat cryptic statement that "it is difficult to visualize the circumstances in which a criminal contempt charge is proper if a trial witness is advised by and relies on counsel" (A. 313). We do not know whether by this he was stating an independent basis for his decision, particularly since the advice of counsel defense depends on a factual determination by the trier of fact that the reliance was in good faith. In any event, the principle that the advice of counsel not to answer is no defense to a contempt information was only recently reaffirmed by the Supreme Court in *Maness* v. *Meyers*, 419 U.S. 449, 463 (1975). Accord: *United States* v. *Snyder*, 428 F.2d 520, 522-523 (C.A. 9, 1970); *United States* v. *Seavers*, 472 F.2d 607, 610-611 (C.A. 6, 1973); *United States* v. *Goldfarb*, 167 F.2d 735 (C.A. 2, 1948).

POINT II

The immunity order was not defective and the defendant Kondo had no standing to raise any defect as a defense to the information.

Section 6003(b) of Title 18 provides that a United States Attorney may, with the approval of the Attorney General, or any designated Assistant Attorney General, request an order conferring use immunity upon a witness who refuses to testify on the ground that his testimony may tend to incriminate him. The Attorney General has designated the Assistant Attorney General in charge of the Criminal Division to approve such authorizations in areas within his jurisdiction (28 C.F.R. 0.175). Moreover, regulations promulgated by the Attorney General provide that the Assistant Attorney General is authorized, in case of absence from his office, or in case of his inability to act, to designate his ranking deputy (or his equivalent) to act in his stead (28 C.F.R. 0.133).

Pursuant to these regulations, Deputy Assistant General, Keuch, acting as Assistant Attorney General, in the absence of the Assistant Attorney General, authorized the immunity application (A. 110) with respect to the defendant Kondo. Judge Dooling held that this authorization was defective because it was not authorized by the Assistant Attorney General. According to Judge Dooling, the purpose of the requirement in Section 6003 was to "fix accountability" upon a high official authorizing the immunity application (A. 314). We believe that this holding is erroneous.

The considerations which influenced the adoption of Section 6003(b) were outlined in the published Working Papers of the National Commission on Reform of Federal Criminal Laws[7] (pp. 1435-1437):

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[7] Its recommendation provided the basis for the present immunity statute (18 U.S.C. 6001 et seq.). See Senate Judiciary Committee Report No. 91-617, 91st Cong., 1st Sess., p. 55 (1969).

Bypassing for a moment the question of statutory language, and focusing only on the policy question of whether or not the Attorney General's function of approving immunity grants should be delegable by him, two opposing considerations appear. *First, the basic rational of requiring Attorney General approval, as set forth by the President's Commission of Law Enforcement and Administration of Justice, is to centralize the approval power so that immunity will be granted only by a person in a position to know the full law enforcement ramifications of a particular immunity grant.* A second, and opposing consideration, is that enactment of a general Federal immunity statute (as the 1968 Omnibus Crime Bill virtually is already) may vastly increase the number of immunity requests from Federal interrogators, thus creating a need for delegation for the sake of administrative efficiency.

On balance, it would seem to be unreasonable to prohibit delegation. There may well be repetitive areas where the Attorney General could set forth immunity policies and allow subordinates to implement the policies, case by case. Further, delegation would not absolve the Attorney General of ultimate responsibility. It also would be expected that a centralized record still would be made of actual immunity grants. If necessary such a central record could be statutorily required, coupled with a duty to make an annual report to Congress on immunity grants.

* * * * *

The draft statute limits delegability by retaining the approval function at a high level and authorizing function at a high level and authorizing delegation only to the Deputy Attorney General

> or an Assistant Attorney General. This language serves to highlight the social cost in immunity grants and minimize the possibility of abuse through overly broad subdelegations by the Attorney General. However, the language may not be essential. The Department of Justice already has required United States Attorneys to check with Washington, as noted in the memorandum of the Department's Criminal Division quoted above at the beginning of the discussion of special clearance provisions [Emphasis supplied].

The procedure by which a Deputy Assistant Attorney General acts in the absence of the Assistant Attorney General does not constitute the "overly broad delegation" of power about which Congress was concerned; instead, it recognizes that the volume of immunity requests, and the necessity for speed in approving requests, justifies a delegation of authority to a high level official in the Criminal Division to act when the Assistant Attorney General is unavailable. None of the concerns reflected by Section 6003(b) are seriously undermined by an authorization by one who is empowered, by regulations promulgated by the Attorney General, to act as an Assistant Attorney General when the person holding that position is unavailable.

The situation here is markedly different from *United States* v. *Giordano*, 416 U.S. 505 (1974), which involved the delegation of authority to approve wiretap applications to an executive assistant to the Attorney General. The delegation here to someone who is an Acting Assistant Attorney General is not of the same kind as in *Giordano*. More significantly, however, the strict construction of the delegability clause at issue there reflected the Congressional feeling that fixing accountability on the

Attorney General or a designated Assistant Attorney General would limit the use of a device that constituted such a massive invasion of privacy (416 U.S. 527-528). Here, on the other hand, the purpose of requiring the United States Attorney to seek authorization from the Department of Justice is simply to insure that the decision that a grant of immunity is in the public interest be made "by a person familiar with the total range of law enforcement policies which would be affected by an immunity grant, and not by one familiar only with the asserted public need in the particular case." (*Working Papers of the National Commission on Reform of Federal Criminal Laws, supra*, at p. 1433). The evaluation contemplated by Congress was made here.

Moreover, it is quite plain that the concerns about delagability to which Congress addressed itself have nothing whatever to do with protecting the rights of witnesses. Cf., *In Re Tierney*, 465 F.2d 806 (C.A. 5, 1972), *certiorari denied*, 409 U.S. 1032. The "social cost" and "abuse" to which working papers of the National Commission allude, reflect concern about the consequences of conferring the benefit of use immunity by persons not in "a position to know the full law enforcement ramifications of a particular immunity grant" (*Working Papers of the National Commission on Reform of Federal Criminal Laws, supra*, at p. 1437 and pp. 1433-1434). Here, as Judge Dooling observed, the defect, if any, would not have deprived the witness of the immunity that was conferred. It is submitted that the defect should not provide a defense to a contempt information.

CONCLUSION

The judgment of the district court should be reversed.

Dated: December 1, 1976.

Respectfully submitted,

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Eastern District of New York.

EDWARD R. KORMAN,
Chief Assistant United States Attorney,
Of Counsel.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 7th day of December, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLANT of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Gladstein, Meyer & Reif, Esqs.
308 Livingston Street
Brooklyn, New York 11217

Evelyn Cohen

Sworn to before me this
7th day of Dec. 1976

Carolyn N. Johnson

CAROLYN N. JOHNSON
Notary Public, State of New York
No. 9278
Qualified in Kings County
Term Expires March 30, 19..77

E NOTICE that the within
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of the United States Dis-
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e ____ day of _____,
o'clock in the forenoon.

, New York,
_____, 19____

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States Attorney,
for _____

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KE NOTICE that the within
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__ day of _____
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_____, 19____
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States Attorney,
for _____

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_____ Action No. _____

UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

_____
United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within
_____ is hereby admitted.
Dated: _____, 19____

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Attorney for _____

FPI-LC-SM-8-73-7385